IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) NO. 45/2018

CIV/APN/230/2017

In the matter between:

TANE NTOLI **APPELLANT**

And

'MASEEISO NTOLI **1ST RESPONDENT**

HER WORSHIP MAGISTRATE

MOTHETHO **2ND RESPONDENT**

HUMAN RESOURCE L.H.D.A **3RD RESPONDENT**

CLERK OF COURT **4TH RESPONDENT**

ATTORNEY GENERAL **5TH RESPONDENT**

CORAM : HON DR. K. E. MOSITO P.
HON P. DAMASEB AJA
HON N. MTSHIYA AJA

HEARD : 23 JANUARY 2019

DELIVERED : 1 FEBRUARY 2019

SUMMARY

Maintenance - For children – duty of parent - Divorced parents having common-law duty to maintain child of dissolved marriage according to their relative means and the circumstances and needs of the child - Such duty continuing after majority - Mother entitled to recover arrears in maintenance payable from father.
Judges and Courts -- Judicial accountability --Tension between public interest in judicial accountability, judicial independence – Failure by High Court judges to provide reasons - Need to devise reasonable means of ensuring judicial accountability, or impermissible infringement of independence of judiciary.

JUDGMENT

DR. K. E. MOSITO P

FACTUAL BACKGROUND

[1] The facts of this case are not in dispute. The parties were married according to customary law and a minor child was born out of the marriage. On the 31st day of July 2014, the respondent approached the Manamela Local Court for dissolution of their marriage which was duly granted and the custody of the minor child was not determined by the court. The minor child remained in custody of the respondent.

[2] On the 22nd day of August 2014 the respondent approached the Butha Buthe Subordinate Court claiming from the appellant maintenance of their minor child in the sum of **M3,000.00**. The Honourable Court ordered the appellant to pay maintenance of **M800.00** per month.

[3] The learned Magistrate presiding over the maintenance proceedings, further ordered that the appellant pay the said maintenance contribution beginning end of September 2014. The said maintenance contribution was to be paid into a bank account which the respondent was to provide.

[4] It is the appellant's case that, ever since then the respondent never provided him with the bank account. His case is that, the account was never furnished to him until after almost three years, on the 30th day of May 2017, when the respondent went to court and complained that the appellant refused to maintain the child and claiming arrears in maintenance contribution.

[5] On the 30th day of May 2017, both parties appeared before Her Worship **Mothetho**. The Appellant contended that he was never given the opportunity to present his case on why he was unable to pay maintenance contribution as per the order of the 22nd day of August 2014. The Magistrate ordered that the Appellant pay **M800.00** maintenance contribution and also pay maintenance contribution arrears of **M26,400.00** to be deducted from the appellant's salary into the respondent's bank account which was provided in court this time.

[6] It was against the above narrative that the appellant approached the court *a quo* on the 20th day of June 2017 with an urgent application for review and stay of execution.

[7] The respondent opposed the application and filed her answering affidavit which mostly denied the appellant's averments that she had failed to furnish him with a bank account the founding affidavit. The respondent alleged that she opened a Ned Bank account the same day of the 22nd day of August 2014 and furnished the appellant with it. She says she was advised by the clerk of court to send the account number through text messages to the appellant, which she claimed she did. There was a clear dispute of fact on the issue whether she indeed furnished the appellant with the account.

[8] The respondent avers that the court *a quo's* order is that the appellant pay arrears of **M26,400.00** in instalments of **M800.00** monthly until he settles the arrears. The respondent attached a garnishee order in support of her allegation which was marked annexure **'MM1'**.

[9] The matter was heard by the court *a quo* and on the 9th day of August 2018, a court order was issued but, to date, there are still no written reasons for judgment in this matter. This is unacceptable. Failure by the High Court judges to provide reasons for their decisions has been a very serious concern for this Court for over two decades now. Decisional accountability is a fundamental aspect of judicial independence. There need to exist a built-in system to ensure that judges are held accountable for their decisions. The duty to provide reasons is an important part of the duty to account. In ***Lesotho Teachers Trade Union (LTTU)***

v Director Teaching Service Department and Others,[1] this Court undertook a methodical review of the numerous cases in which it had deprecated the practices of some of the High Court judges who fail to provide reasons for their judgments. Thereafter, this Court proceeded as follows:

> [5]As long ago 1968 Lord Denning MR, in the Court of Appeal in England, held in Padtield v Minister of Agriculture. Fisheries and Food 1968 (1) ALL ER694 (also reported in1968 AC 997) that failure to give reasons may justify the court to infer that there are no good reasons. That was admittedly said in the context of an administrative decision but the principle laid down therein is, in my view, equally valid for decisions of courts of law.
> [6] I have had occasion in the past to say something on this subject and it is with regret that I have to return to it. It has come to our attention in the Court of Appeal that there are judges in the High Court, who fail, sometimes even often fail, to produce reasons for their judgments. In such cases appeals

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[1]*In Lesotho Teachers Trade Union (LTTU) v Director Teaching Service Department and Others LAC (2000-2004) 803 at 804-805, this Court had occasion to remark that, "[3] In Rex v Tseliso Masike C of A (CRI) No. 7 of 2002 (unreported) this Court had occasion to slate the following remarks at page 3 thereof concerning failure to give reasons: "On16 August 2002 the High Court (Peete, J) upheld the appeal against the conviction and accordingly ordered the return of the firearm in question to the respondent. The appeal fee and the fine in question were also refunded to the respondent. Regrettably the learned Judge a quo advanced no reasons for his order. This, despite several warnings by this Court strongly deprecating the failure by judicial officers to provide reasons, something which can only bring the justice system into disrepute. See for example Mpho Hlalele & Another v DPP- C OF A (CRl) No.12 of 2000 (unreported) where Steyn P (Ramodibedi and Van den Heever JJA concurring) expressed himself in the following terms; "The failure by both Courts to give reasons for their decisions is particularly reprehensible. See in this regard Molapo Ohobela v B.C.P. - C of A 8 of 2000 (unreported). See also S v Immelman 1978 (3) S.A. 726 at p.729 (A) where Corbett JA says the following: 'The absence of such reasons may operate unfairly, as against both the accused person and the State. One of the various problems which may be occasioned in the Court of Appeal by the absence of reasons is that in a case where there has been a plea of guilty but evidence has been led, there may be no indication as to how the Court resolved issues of fact thrown up by the evidence or on what factual basis the Court approached the question of sentence.'"[4] Similarly, in Attorney-General and 5 Others v Mantsane Tsoloane Bolepo and 29 Others C of A (CTV) No. 8 of 2002 (unreported) this Court expressed its concern in the following terms at page 3 thereof:"On 20 March 2002 this order, with interest and costs, was granted by Monapathi J. The learned judge undertook to amplify his "ruling" with "full reasons/ 1 One notes, with grave concern, that they have not been furnished."*

> in the Court of Appeal are heard without the benefit of reasons. Quite obviously such a practice cannot be deprecated strongly enough as it is not only unethical but it also leads to a perception that judges give arbitrary decisions which are not supported by any reasons. It need hardly be stated that arbitrariness is itself a form of dictatorship which is in turn a foreign concept to the rule of law that we seek to uphold as judges. If allowed to continue, such practice will no doubt bring the whole justice system into disrepute. It undoubtedly leads to loss of public confidence in the ability of courts to resolve disputes.
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> [7] It cannot be emphasized strongly enough that a duty to give reasons inspires public confidence in the courts that their decisions are not arbitrary but rational. It enables the litigants concerned to know why a decision was reached one way or the other.
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> [8] Having said this, however, I should not be understood to convey that the practice of delivering an ex tempore judgment should not fee resorted to in all cases. Each case must obviously turn on its own particular circumstances. I would lay it down as a general proposition, however, that such practice should be avoided. In this regard it is useful to bear in mind the definition of the term "ex tempore" which is this: "without preparation or premeditation" (see Black's Law Dictionary - Abridged Fifth Edition at page 300). Once that is so, it follows that an ex tempore judgment cannot inspire confidence in the litigants about the correctness of such judgement. Not only does it lead to uncertainty but it also encourages litigation rather than discourage it. Needless to say that to discourage litigation through sound, lucid and well-reasoned judgments is the fundamental function of the courts of law.
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> [9] It is hardly necessary to repeat that failure to give reasons on the other hand is a practice completely foreign to a proper judicial system in an open democratic society. It is in essence a special form of dictatorship and as such may only bring our justice system into disrepute. The learned Chief Justice's urgent attention is now accordingly drawn to this unacceptable practice for appropriate action.

[10] In ***R v Mohale and Another***[2], at [14], this Court remark that, '[t]he most disturbing feature of this case, in my view, is the fact that the learned Judge a quo failed to give any reasons for her

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[2] *R v Mohale and Another (C of A (CRI) No.2 of 2005)*

differential treatment of the Appellants in so far as sentence is concerned…This Court has stated often enough that failure to give reasons may often give the impression that the decision is arbitrary and thus bring the justice system into disrepute. Be that as it may, however, the absence of reasons for the imposition of disparate sentences in this matter amounts to a misdirection. It therefore means that this Court is now at large to do its best and consider sentence afresh.'

[11] In **Jaase and Others v Jaase and Others**[3], Chinhengo AJA (with Musonda and Louw AJJA concurring) stated:

> [9] I do not think that this point can be made with any greater force. Reasons for judgment must always be given for the reasons outlined above and also for the very important reason that the giving of reasons for judgment is the way, if not the only way, by which judges are held accountable for their decisions and conduct on the bench.

[12] We respectfully agree with all the above remarks by this Court. All the above remarks notwithstanding, there is no apparent movement away from this unacceptable practice of failure to give reasons by some of the High Court judges. In order to improve the quality of judicial service in our superior courts by fostering judicial accountability, consistent with the independence of the judiciary, there is an urgent need to institutionalise a mechanism to correct this pressing issue of lack of judicial accountability in the High Court.

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[3] Jaase and Others v Jaase and Others C OF A (CIV) A/62/17 at para

ISSUES FOR DETERMINATION

[13] The issue for determination is simply whether the court a *quo* was correct in law in ordering appellant to pay arrear maintenance.

THE LAW

[14] Section 20(2)(b) of the ***Children's Protection and Welfare Act, 2011*** provides that, '[a] parent or guardian has a responsibility, whether imposed by law or otherwise, towards the child, including the responsibility to provide good guidance, care, assistance and maintenance for the child to ensure his survival and development.' According to Professor Poulter in ***Legal Dualism in Lesotho***,**1981** at p. 80 '[a]t common law a father's duty of support extends to his legitimate and illegitimate children…' As Vivier JA correctly pointed out in ***Bursey v Bursey and Another***,[4] according to our common law both parents have a duty to maintain a child of the marriage. It is trite that the duty of support includes the obligation to provide the child with a suitable education. The incidence of this duty in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time. Even upon divorce, a maintenance order does not replace or alter a divorced parent's common-law duty to maintain a child. The maintenance order is, ancillary to the common-law duty of support and merely regulates the incidence of this duty as between the parents. Depending on the terms of the order, a maintenance order exists separately from the fluctuations of the incidence of the common-law duty to

[4] Bursey v Bursey and Another 1999 (3) SA 33 (SCA) at p36.

maintain but may be brought into harmony with that duty by the Court at any time. The order is not *ipso jure* varied by changed circumstances but remains fully effective until terminated or varied by the Court. The order itself may, however, stipulate a period for its operation, for example until the child reaches a certain age, and it will cease to operate at that stage. As has been correctly pointed out, systemic failures to enforce maintenance orders have a negative impact on the rule of law.[5] Thus, a parent or guardian of a child, whether the parents of the child continue to live together or not, shall not deprive the child of his or her welfare.

APPLICATION OF THE LAW TO THE FACTS

[15] It is clear that the appellant is, in law, liable to maintain the minor child. Any attempt to dispute liability to maintain the minor child by the Appellant is without legal foundation. Regard being had to the legal position explained above, I hold that the Appellant is in law obliged to maintain the minor child.

[16] The next point is whether there is merit in the contention by the Appellant's counsel that the Appellant could not pay his maintenance contribution because he had not been provided with

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[5] *See Bannatyne v Bannatyne 2003 (2) SA 363 (CC) in para [27]:'Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.'*

a bank account into which to pay such maintenance. The Appellant's counsel argued in this connection that the Appellant could not pay maintenance because the learned magistrate had, by ordering him to be provided with a bank account by the respondent, imposed *'a suspensive condition'* in terms of which he could only be expected to pay maintenance if an account had been provided into which to pay the said amount. I am unable to agree with this contention. The reason for this is that the term *suspensive condition* is a technical term of art. A *suspensive condition* is one which has the effect of deferring the commencement of the operation of a juristic act until the determination, in the appropriate sense, of the contingency specified in the condition. As to when a seller may be estopped from relying on a *suspensive condition*, see **Morum Bros Ltd v Nepgen**.[6] In **Design and Planning Service v Kruger**[7] the Court considered whether a stipulation amounted to a suspensive condition or a term of the and contrasted the two concepts. See also **Borstlap v Spangenberg**[8]; **Odendaalsrus Municipality v New Nigel Estate GM Co.**[9]; **Vorster v Snyman**.[10] When can one party unilaterally prevent the condition being fulfilled? See **Deetlefs v Wright**.[11] See **1967 *Annual Survey* 81 97; 1970 *Annual Survey* 112; 1971 *Annual Survey* 89; 1972 *Annual Survey* 75; 1973 *Annual Survey* 71; 1971 SALJ 418**.[12]

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[6] *Morum Bros Ltd v Nepgen 1996 OPD 404.*
[7] *Design and Planning Service v Kruger 1974 1 SA 689 (T).*
[8] *Borstlap v Spangenberg 1974 3 SA 695 (A).*
[9] *Odendaalsrus Municipality v New Nigel EstateGM Co.Ltd1948 2 SA 656 (A).*
[10] *Vorster v Snyman 1974 4 SA 450 (C).*
[11] *Deetlefs v Wright 1977 2 SA 560 (A).*
[12] *See 1967 Annual Survey 81 97; 1970 Annual Survey 112; 1971 Annual Survey 89; 1972 Annual Survey 75; 1973 Annual Survey 71; 1971 SALJ 418.*

[17] There is no substance in the argument advanced by the learned counsel that the learned judge erred by concluding that the Appellant owed the respondent arrears for maintenance which ought to be executed. As Olivier JA pointed out in ***Cohen v Cohen***[13] one must give a common-sense interpretation to the judgment and order made by the magistrate. The point of departure is to identify the issue between the parties that the maintenance court was called upon to decide and then to compare the order made with that issue. If there is any ambiguity, the order should be interpreted restrictively, so as to be limited to the said issue. The analogy with the basic principle of statutory interpretation, *viz* that the statute must be restrictively interpreted having regard to its object and rationale, is both convincing and obvious.[14]

[18] The matter before the learned magistrate was for the Appellant to show cause (if any) why he should not be called upon to support the minor child. The case being made was that he had not supported the minor child since March 2014. In context the parties had not intended the providing of a bank account number to constitute a condition of the maintenance order. I am therefore of the view that there is no substance in the contention advanced by the learned counsel. In any event on the facts of this case, the

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[13] Cohen v Cohen 2003 (3) SA 337 (SCA) at para 14.

[14] see, for example, *Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 78C - D; Barclays Zimbabwe Nominees (Pvt) Ltd v Black 1990 (4) SA 720 (A) at 726D - E; Engels v Allied Chemical Manufacturers (Pty) Ltd and Another 1993 (4) SA 45 (Nm); Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal 2001 (3) SA 9 (SCA) at 18J - 19A; S v Radebe H 1988 (1) SA 772 (A) at 778C - G and see Administrator, Cape, and Another v Ntshwaqela and Others 1990 (1) SA 705 (A) at 715F et seq; Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 304D - H).*

respondent alleged that she opened a Ned Bank account the same day of the 22nd day of August 2014 and furnished the appellant with it. Although there is a dispute of fact on this issue, we are, on the *Plascon Evans principle*, obliged to assume the correctness of the version of the respondent.

[19] Later on in argument, the appellant's case became one that, the appellant would not pay arrear maintenance because it had not been properly quantified. This is an argument completely different from the one earlier advanced that he could not pay because there was no bank account. I am therefore of the view that the appellant is trying to resist discharging his legal obligation to maintain the minor child by raising a lot of dust for nothing.

DISPOSITION

[20] In the result and for the foregoing reasons, I come to the conclusion that the appeal must be dismissed. I hold that the respondent is entitled to claim the arrears and Appellant must be ordered to the arrear maintenance for the minor child. In the result the following order is made:

(1)The appeal is dismissed with costs.

(2)The order of the High Court is confirmed.

(3)The Appellant is directed to approach the Clerk of the Subordinate Court of Botha-Bothe within fourteen days

hereof, with documentary proof of his contribution for the maintenance of the minor child in respect of the period covered by the order of the Subordinate Court and, in respect of which arrears in maintenance are claimed.

(4) The Appellant is to pay the difference if any in arrears into the account provided within thirty days of his meeting with the Clerk of Court.

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DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree:

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P.T. DAMASEB
ACTING JUSTICE OF APPEAL

I agree:

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M.T. MTSHIYA
ACTING JUSTICE OF APPEAL

For Appellant:	Adv L. Lefikanyana
For Respondent:	In person